

Gold-Cumberbatch v Gilani
2018 NY Slip Op 34184(U)
September 12, 2018
Supreme Court, Westchester County
Docket Number: Index No. 68943/2016
Judge: Terry Jane Ruderman
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
MORGAN GOLD-CUMBERBATCH,

Plaintiff,

DECISION & ORDER

-against-

Index No. 68943/2016
Seq. No. 4

SANA GILANI, SAEEDA ASAD GILANI,
HUNTER KLEIN and STUART KLEIN,

Defendants.

-----X
RUDERMAN , J.

The following papers were read on this cross-motion (sequence number 4) by defendants, Sana Gilani and Seeda Asad Gilani, for an order granting summary judgment dismissing the Complaint, together with such other and further relief as this court deems just and proper:

Notice of Cross-Motion; Affirmation in Support
NYSCEF record

Upon the foregoing papers, this motion is determined as follows:

This action was commenced by the service and filing of a Summons and Verified Complaint on December 14, 2016 to recover for injuries allegedly sustained by plaintiff in an automobile accident on December 30, 2015 with a vehicle owned by defendant Saeeda Asad Gilani and operated by Sana Gilani (the "Gilanis"). On December 20, 2016, plaintiff was involved in a second accident with a vehicle operated by defendant Hunter Klein and owned by Stuart Klein (the "Kleins"). On December 28, 2016, plaintiff served and filed a Supplemental Summons and Amended Complaint in this action, adding the Kleins as defendants and adding a cause of action against them arising from the second accident. The Gilanis filed their Answer on January 11, 2017, and an Amended Answer on January 24, 2017. The Kleins filed their Answer on February 13, 2017.

Thereafter, plaintiff moved for partial summary judgment on liability against the defendants for both accidents. In a Decision and Order entered on June 19, 2017, this Court (Ecker, J.) granted the motion as to the Gilanis and denied the motion as to the Kleins. Following the completion of discovery, a Trial Readiness Stipulation was so ordered on April 26, 2018 and plaintiff filed her Note of Issue on the same date.

On June 7, 2018, the Kleins moved for summary judgment dismissing the Verified Complaint against them on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) and that the action as asserted against said defendants may not be maintained as a matter of law. By cross-motion filed on June 20, 2018, the Gilanis moved for

summary judgment dismissing the Verified Complaint against them on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). On July 23, 2018, counsel for the Kleins filed a Stipulation of Discontinuance signed by counsel for plaintiff and counsel for the Kleins.¹

Prior to addressing the merits of the motion, the court must address the issue of timeliness. In 2009, a new Differentiated Case Management (DCM) Protocol was introduced in Westchester County Supreme Court to ensure effective case management. The DCM Protocol was designed to ensure the timely prosecution of cases from inception to trial and facilitate settlements. As implemented, the DCM Protocol limits adjournments and delays and requires that the parties actively pursue the prosecution and defense of actions. Deadlines are enforced in Westchester County Supreme Court civil cases pursuant to the DCM Protocol.

In February 2016, the Chief Judge of the State of New York, Hon. Janet DiFiore, announced the “Excellence Initiative” for the New York State Unified Court System. The Excellence Initiative seeks to achieve and maintain excellence in court operations by eliminating backlogs and delays. The Excellence Initiative relies on “Standards and Goals” as the benchmark for the timely resolution of cases. The Ninth Judicial District is committed to carrying out the Chief Judge’s Excellence Initiative and delivering justice in a timely and efficient manner to all that enter our courts.

The Court of Appeals has explained the importance of adhering to court deadlines as follows:

“As we made clear in *Brill*, and underscore here, statutory time frames--like court-ordered time frames--are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored” (*Miceli v State Farm Mutual Automobile Insurance Company*, 3 NY3d 725, 726–727 [2004] [internal citations omitted]).

The Court of Appeals again stressed the importance of adhering to deadlines as follows:

“As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules

¹The Court notes that this stipulation of discontinuance was not executed by all parties in this action. CPLR 3217(a)(2) requires, for a discontinuation by stipulation, a writing signed by the attorneys of record for all parties (*see Phillips v Trommel Construction*, 101AD3d [2d Dept 2012]). Therefore, the stipulation is ineffective in the absence of a signature by Gilanis’ counsel.

and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010] [internal citations omitted]).

CPLR 2004 permits the court, in the exercise of its discretion, to grant an extension of time fixed by statute, rule or court order, upon a showing of good cause. “In the absence of a showing of good cause for the delay in filing a motion for summary judgment, ‘the court has no discretion to entertain even a meritorious nonprejudicial motion for summary judgment’” (*Greenpoint Props, Inc. v Carter*, 82 AD3d 1157, 1158 [2d Dept 2011], quoting *John P. Krupski & Bros., Inc. v Town Bd. of Southold*, 54 AD3d 899, 901 [2d Dept 2008]; see *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Pursuant to the DCM Protocol Part Rules with respect to post-note of issue summary judgment motions, “any motion for summary judgment by any party must be made within forty-five (45) days following the filing of the Note of Issue” (DCM Rule II.D, available at https://www.nycourts.gov/courts/9jd/diffCaseMgmt/DCM_protocol.pdf).² The trial readiness order issued by this court on June 4, 2018 contains similar language. In addition, the Part Rules state in bold-face type:

“Counsel are cautioned that untimely motions cannot be made timely by denominating such as cross-motions. The failure of a party to serve and file a motion or cross-motion within the 45-day time period pursuant to this protocol and the Trial Readiness Order shall result in the denial of the untimely motion or cross-motion” (DCM Rule II.D [emphasis in original]).

While the DCM Protocol authorizes limited extensions of return dates on summary judgment motions, it invites no extension of the time for making such motions.

Based on the Part Rules set forth above, all summary judgment motions were due within 45 days of the filing of the note of issue. Here, the Kleins’ motion, filed on June 7, 2018, was filed within 45 days after plaintiff filed the note of issue. Accordingly, the Kleins’ motion was timely. By contrast, the Gilanis’ cross-motion for summary judgment – filed on June 20, 2018, 54 days after the note of issue was filed – was untimely.

The Gilanis’ untimely cross-motion is a clear example of the dilatory tactics that adversely

² The protocol was most recently updated on February 23, 2018; however, no changes were made to the sections in effect when plaintiff filed the note of issue in the instant matter.

impact the timely disposition of cases. Rather than filing a motion within the applicable period, the Gilanis waited until after the Kleins filed their motion before filing their own motion. The Gilanis did not file their motion by the deadline set forth in the trial readiness order, which provided that “[a]ny motion for summary judgment by any party must be served via NYSCEF within 45 days following the filing of the Note of Issue” [emphasis added]. The Gilanis also failed to establish, much less allege, good cause for the delay (*see generally Brill v City of New York*, 2 NY3d 648 [2004]; *see Gonzalez v Zam Apt. Corp.*, 11 AD3d 657, 658 [2d Dept 2004]).

Standards and goals for civil cases in which a note of issue is filed is one year from the filing of the note of issue. If the making of summary judgment motions is delayed for months, this will inevitably mean that either counsel will be rushed to trial or else the case will go over standards and goals. The situation is compounded by adjournments of such motions, particularly where the adjournments are repeated and the motions were already made late. While standards and goals are not immutable, and exceptions will always exist, compliance should be the norm, not the exception. If counsel are serious about their motions, they should make them on time or, if they believe that they cannot, they should apply for relief, setting forth the good cause for granting it. What they cannot do is avoid the necessity for showing good cause by simply waiting until some other party moves within the time allowed and then take advantage of that party by denominating an untimely motion as a “cross-motion.”

It has been held that untimely cross-motions may be considered by the court, in the exercise of its discretion, where a timely motion for summary judgment has been made on nearly identical grounds (*see Williams v Wright*, 119 AD3d 670 [2d Dept 2014]). However, regardless of whether the grounds are identical, the case law does not mandate that the court must entertain such untimely cross-motions, especially where, as here, to do so would result in the circumvention of the Part Rules established by the court and reward non-compliance with court deadlines, without good cause. Further, a cross-motion is an improper vehicle for seeking relief from a nonmoving party (*Kershaw v Hospital for Special Surgery* (114 AD3d 75, 88 [1st Dept 2013])). Therefore, although unopposed, the Gilanis’ cross-motion must be denied as improper and untimely (*see Finger v Saal*, 56 AD3d 606 [2d Dept 2008]).

In view of the foregoing, it is hereby

ORDERED that the cross-motion by Sana Gilani and Saeeda Asad Gilani (sequence number 4) is denied; and it is further

ORDERED that plaintiff shall serve a copy of this Decision and Order, with notice of entry, upon plaintiff within five days of entry.

The foregoing constitutes the Decision and Order of this court.

Dated: White Plains, New York
September 12, 2018


HON. TERRY JANE RUDERMAN, J.S.C.

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